

**PANEL III:  
THE BILL OF RIGHTS AND  
GOVERNMENTAL STRUCTURE:  
REPUBLICANISM AND MEDIATING  
INSTITUTIONS**

**SOME COMMENTS ON "THE BILL OF  
RIGHTS AS A CONSTITUTION"**

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Let me try to explain what I mean by the title of my paper, "The Bill of Rights as a Constitution."<sup>1</sup> Some years ago, Professor Berns wrote a very thoughtful essay called "The Constitution as Bill of Rights,"<sup>2</sup> picking up on Alexander Hamilton's analysis in *The Federalist Number 84*, in which Hamilton argued that the Constitution was for every important purpose itself a Bill of Rights.<sup>3</sup> What Hamilton meant was that the structure of government played a very important role in protecting people from government tyranny. There are not many "thou shalt not" provisions in the Constitution;<sup>4</sup> the document's main emphasis is on more self-consciously structural issues like federalism, separation of powers, bicameralism, representation, and constitutional amendment.<sup>5</sup> Hamilton was arguing that through devices such as these, liberty would be protected and government held in check.<sup>6</sup> Hamilton also argued in *The Federalist Number 84* that the Preamble was profoundly important;<sup>7</sup> that most of the important rights of the people were retained

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1. What follows is a lightly edited version of my oral remarks at the 1991 Federalist Society Symposium, summarizing my article, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991). The interested reader is encouraged to refer to my more detailed presentation in that essay.

2. See Walter Berns, *The Constitution as Bill of Rights*, in *HOW DOES THE CONSTITUTION SECURE RIGHTS?* 50 (Robert A. Goldwin & William A. Schambra eds., 1985).

3. See THE FEDERALIST No. 84, at 515 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

4. See, e.g., U.S. CONST. art. I, § 9 (limiting the powers of Congress); art. I, § 10 (restricting the powers of the States).

5. See, e.g., U.S. CONST. art. I-III (vesting legislative, executive, and judicial powers in separate institutions, respectively); art. I, §§ 1-2 (providing for bicameral legislature); art. V (outlining nonexclusive procedure for constitutional amendment).

6. See THE FEDERALIST No. 84, *supra* note 3, at 510-11.

7. See *id.* at 513.

simply by the language of the Preamble and the philosophy it represented: "We the People of the United States . . . do ordain and establish this Constitution . . . ." <sup>8</sup> What he meant is that here we have a document emanating from a popular sovereign, and popular sovereignty (or what Professor Graglia would probably call "democracy" or "majoritarianism") <sup>9</sup> is an important device for securing liberty—especially the public liberty of democratic or collective self-governance.

I would like to suggest that if we look carefully at the Bill of Rights, we will see it as much less discontinuous with the original Constitution than most of us have been led to believe. Most of us tend to embrace the conventional reading that the Bill of Rights is fundamentally, paradigmatically, not about structure—that is, not about things like federalism, bicameralism, representation, and constitutional amendment. Most of us also think that the Bill of Rights is not about majoritarianism. Rather, we think the Bill of Rights is self-consciously counter-majoritarian at its core: We think the Bill of Rights is about individual rights, not majority rights. I think that is wrong. The essence of the Bill of Rights and the essence of the Constitution are profoundly populist, democratic, majoritarian, and structural.

Now, let me try to defend my rather sweeping claims about both the original Constitution and the Bill of Rights. First, let me remind you that those who adopted our Constitution were Revolutionaries. <sup>10</sup> They saw themselves as Revolutionaries. In their own era they were radical democrats. It is true that in Eighteenth Century America there were profound exclusions from the perspective of 1991—women, slaves, et cetera—but from the perspective of 1787, the process by which the Constitution became the supreme law of the land was more fundamentally participatory and democratic than anything that had ever preceded it in the history of the planet. Previous societies had been chartered by individual great men and lawgivers claiming a pipeline to God, such as Moses, Solon, and Lycurgus. Even in the American experience, the predecessor to the

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8. U.S. CONST. pmbl.

9. See Lino Graglia, *How Should Courts Interpret the Bill of Rights?*, 15 HARV. J.L. & PUB. POL'Y 149, 151-52 (1992).

10. But see CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION* (1913) (arguing that anti-democratic economic interests, and in particular wealthy property owners, were behind ratification of the Constitution).

Constitution, the Articles of Confederation, was never adopted by the peoples of the States.<sup>11</sup> Nor were the state constitutions popularly ratified, except for those of New Hampshire and Massachusetts in 1784 and 1780, respectively.<sup>12</sup> So the pre-existing state constitutions had not directly involved the people and neither had the Articles of Confederation—but the Constitution did. Look at the most important—the constitutive—part of the original Constitution, Article VII, which says that by a simple majority vote of a specially convened convention, the people of Virginia could make the Constitution their supreme law.<sup>13</sup> Whether you look at the Preamble, with its language “We the People of the United States,” which sounds so populist, or Article VII, the last article of the original Constitution, the essence of the document, I would argue, is fundamentally participatory, democratic, and majoritarian at the most important level.

What level is that? It is the level of who gets to make the Constitution and therefore who can “un-make” it. Ordinary day-to-day governance, of course, is more detached from the people—indirect election of Senators, a filtered presidency, a judiciary that is ever more insulated—but with regard to the process of Constitutional creation, Article VII is extraordinarily majoritarian and democratic. As I have argued at previous Federalist Society meetings, the process of constitutional amendment is likewise majoritarian.<sup>14</sup> I do not believe that Article V is the exclusive mechanism by which the Constitution can be amended.<sup>15</sup> The people retain—and here I am using the phrase “the people” to mean the collective popular sovereign—an unalterable, inalienable, and indefeasible right to alter and abolish their government by simple majority vote in specially convened conventions. That is how the Constitution was adopted in the 1780s, state constitutions notwithstanding, and that is how it can be amended.

What I want to argue here is that the Bill of Rights is consistent with that vision. The phrase “the people” appears twice in

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11. See EDMUND S. MORGAN, *THE BIRTH OF THE REPUBLIC 1763-89*, at 100-11 (1977).

12. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 306-43 (1969).

13. See U.S. CONST. art. VII.

14. See generally Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988) (elaborating the ideas summarized in this paragraph).

15. See U.S. CONST. art. V.

the original Constitution—in the Preamble and in Article I's reference to "the people" voting for Congress. There is no phrase that appears more often in the Bill of Rights than the phrase "the people." Here, too, the phrase had a core meaning of the people *collectively*. In its core, in its essence, the phrase is about popular sovereignty. It is there in the First Amendment, the right of the people to assemble and petition.<sup>16</sup> It is there in the Second, the right of the people to keep and bear arms.<sup>17</sup> It is there in the Fourth,<sup>18</sup> the Ninth,<sup>19</sup> and the Tenth Amendments.<sup>20</sup> In virtually every case, we can understand it as an echo of the popular sovereignty motif of the original Constitution.

### I. A BIRD'S EYE VIEW OF THE BILL OF RIGHTS

Let me briefly try to offer some readings of the various clauses of the Bill of Rights—readings rather different from what you have probably heard in law school. Each one of these readings may sound a little odd to you, and when you put them together they will sound very odd to you, but their overall consistency and harmony suggest that the original Bill of Rights was rather different from the way we have imagined it. Before I do that, however, let me say one final thing. We may today have the Bill of Rights that is appropriate and that we deserve, but it is a very different one from the one that was created 200 years ago. I would suggest that if that is so, if the transformation of the Bill of Rights has been legitimate on interpretivist grounds, for those who take seriously the document as a whole, it is only because the Bill of Rights was profoundly changed when it was incorporated against the States via the Fourteenth Amendment. So the debate really will turn on whether the Fourteenth Amendment is appropriately read to incorporate the Bill of

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16. See U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of *the people* peaceably to assemble, and to petition the Government for a redress of grievances.") (emphasis added).

17. See U.S. CONST. amend. II ("[T]he right of *the people* to keep and bear Arms . . . shall not be infringed.") (emphasis added).

18. See U.S. CONST. amend. IV ("The right of *the people* to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .") (emphasis added).

19. See U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by *the people*.") (emphasis added).

20. See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to *the people*.") (emphasis added).

Rights against the States. If the case for incorporation can be made,<sup>21</sup> then the essence of the Bill of Rights becomes very different because Reconstruction was about protecting minorities and counter-majoritarian rights in a way that the original Bill of Rights, I argue, was not.

There were twelve original amendments that were proposed by the first Congress.<sup>22</sup> Only the last ten were ratified. So the thing that we call the "First Amendment" was not the first amendment. The original "First Amendment" actually had to do with government size. It said Congress needed to be bigger; there had to be a secure minimum size of Congress going beyond what Article I provided.<sup>23</sup> It was, in its essence, a structural provision about representation, reflecting the idea that liberty will best be protected if government is more representative of the people. With a small Congress, only a few great elite men would get into office and they would not have a sense of fellow feeling and sympathy with ordinary constituents. So by expanding Congress's size, the original "First Amendment" was designed to tighten the link between Congress and its constituents. That is a majoritarian kind of amendment, an amendment about structure and representation. The original "Second Amendment" prohibited Congress from voting itself a pay increase until there had been an intervening election.<sup>24</sup> Once again, we see here concerns about the structure of government, about government self-dealing, and about the possibility of an

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21. There is considerable debate on this issue, into which I have entered elsewhere. See, e.g., Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. (forthcoming 1992). Compare *Adamson v. California*, 332 U.S. 46, 74-75 (1947) (Black, J., dissenting) (maintaining that "no state could deprive its citizens of the privileges and protections of the Bill of Rights") with 332 U.S. at 59-68 (Frankfurter, J., concurring) (critiquing Justice Black's view) and William J. Brennan, *The Bill of Rights and the States*, 36 N.Y.U. L. REV. 761 (1964) (promoting compromise of "selective incorporation").

22. See 1 Stat. 97-98 (1789).

23. The original text read:

After the first enumeration required by the first article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which the proportion shall be so regulated by Congress, that there shall be not less than one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred; after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons.

*Id.* at 97.

24. The original text read: "No law varying the compensation for the services of the Senators and Representatives shall take effect, until an election of Representatives shall have intervened." 1 Stat. 97 (1789).

unrepresentative government. This was a majoritarian provision, too.

Here is another way of putting the point. Recall *The Federalist Number 51*.<sup>25</sup> Madison says there are two basic issues in government. One is protecting citizens generally against an unrepresentative government.<sup>26</sup> In a corporation, if a board of directors and a management team are established, they may try to run the corporation in their own interest and not in the interest of the shareholders. That is the first problem with government—making sure that government officials are not doing things solely for their own benefit. The second issue, Madison says, is protecting a minority from a majority of fellow citizens,<sup>27</sup> like protecting a minority of shareholders from a majority of shareholders. The original Bill of Rights was much more about the first issue—what economists would call the “agency” problem of government—than it was about the second issue. It was much more about protecting majorities of citizens from possibly unrepresentative, elitist, and self-interested government. We see that in the original “First Amendment,” which came within one state of being adopted.<sup>28</sup> The original “Second Amendment” was also clearly about government self-dealing.

Now, consider *our* First Amendment, which today is often understood as protecting individual autonomy, self-expression, and personhood. These are important themes—I do not want to suggest that they are not—but they are not all of the First Amendment. Rather, as Alexander Meiklejohn has argued,<sup>29</sup> the core of the First Amendment is about representative government and the need for constituents to be able to participate in that representative process by voicing their views. It is also about protecting a majority of people from a possibly unrepresentative government. Under the original (un-Reconstructed)

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25. See THE FEDERALIST No. 51 (James Madison).

26. See *id.* at 323 (Clinton Rossiter ed., 1961).

27. See *id.* at 323-25.

28. Only Delaware voted against it. Delaware favored a smaller Congress, because in a smaller Congress it would receive a larger share of the vote. Ten of the states ratified this amendment; one did not. This is the only difference between the original “First Amendment” and the last ten, which were ratified by eleven states and are now in the Constitution. See 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 321-76 (Washington, Department of State, 1894).

29. See ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960).

vision, the paradigmatic First Amendment rights-holders are not Jehovah's Witnesses or Communists or unpopular speakers; they are the Republican Party of 1800 that actually represented a majority of the citizens, but whose speech was being suppressed by an unrepresentative Congress. That is why, for example, these Republicans were trying to argue to a jury that the Alien and Sedition Acts were unconstitutional.<sup>30</sup> A jury is a more populist body. A jury will protect popular speech criticizing government, and that is why there is a strong linkage between free speech and jury trial in the Eighteenth Century.<sup>31</sup> Today, because we think the First Amendment is counter-majoritarian, we distrust juries and we try to get issues to judges rather than juries. Note one final thing about the Sedition Act. Here we see government trying to keep itself in office. It is a crime for a challenger to criticize an incumbent Congressman, but it is not a crime for the incumbent Congressman to criticize his challenger. The Act illustrates the problem of government officials entrenching themselves in office, the agency problem, the self-dealing problem of government.

The original right of "the people" to "assemble" is about the right of the people to assemble *in conventions* to alter and abolish their government. The Second Amendment is in large part about protecting the right of revolution against an unrepresentative government, and in particular one trying to use a federal standing army to suppress a majority of citizens and repress democracy. So, too, with the Third Amendment. It is not so much about privacy; it is about controlling a federal government that is going to have an army and therefore be able to repress a majority of citizens. The Fourth Amendment is in large part about making sure that people whose houses are searched by an unrepresentative government can get to a popular jury. The key clause of the Fourth Amendment is that gov-

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30. See JAMES M. SMITH, *FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* 159-417 (1956).

31. Recall John Peter Zenger and the Alien and Sedition Laws. Zenger, who published a newspaper entitled the New York Weekly Journal in which the policies of the royal government were criticized, was charged with seditious libel and brought to trial in 1734-35. His acquittal by a New York jury was a landmark decision in helping to establish freedom of the press in America. See JAMES ALEXANDER, *A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER* (1989). Likewise, the controversy surrounding the Alien and Sedition Laws focused attention on the linkage between jury trial and the press. See 1 Stat. 577-78, 596-97 (1798); SMITH, *supra* note 30, at 418-33.

ernment searches and seizures must be reasonable.<sup>32</sup> Today judges may arrogate Fourth Amendment issues to themselves, but 200 years ago reasonableness was a question for the jury to decide. Once again the idea was that local and populist institutions like juries would keep an unrepresentative government in check.

In the Fifth Amendment, the Takings Clause<sup>33</sup> seems a little bit more of an individual rights provision than the rest. Yet even here, the Clause applies only against the federal government and not the States. The federal government is the government that actually is going to be less representative, but as *The Federalist Number 10* tells us, there is not going to be a majority tyranny problem in the federal government the way there will be with the States.<sup>34</sup> So the fact that the Takings Clause—like the rest of the Bill of Rights—applies only against the federal government suggests that its core concern is not abusive majoritarianism but unrepresentative government. What about the rest of the Fifth Amendment? Due process means, in its core, presentment by good and lawful men, that is, a populist grand jury that is rooted in the right of the people to participate in government. Double jeopardy is about protecting the integrity of an original jury verdict against being overturned.

The jury is featured in three separate amendments: in the Fifth (grand jury),<sup>35</sup> in the Sixth (criminal jury),<sup>36</sup> and in the Seventh (civil jury).<sup>37</sup> The jury is not just about litigants' rights; it is about the people's rights to be on the jury and to participate in government. This vision sees the jury as a democratic public school, educating citizens in their rights and duties. It connects to Judge Easterbrook's point about how the Constitution, to make a difference, has to be the lived experience of

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32. See U.S. CONST. amend. IV ("The right of the people . . . against unreasonable searches and seizures, shall not be violated . . .").

33. See U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

34. See THE FEDERALIST No. 10, at 82-84 (James Madison) (Clinton Rossiter ed., 1961).

35. See U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .").

36. See U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .").

37. See U.S. CONST. amend. VII ("In suits at common law . . . the right of trial by jury shall be preserved . . .").



citizens and be integrated into the culture.<sup>38</sup> Part of the way to do that is to have jury service.

Juries are also about judicial bicameralism. There is a more elitist upper house (the judge) and a more populist lower house (the jury). Two hundred years ago, juries were often judges of both law and fact. If you thought a statute was unconstitutional and you were being prosecuted under it, as with the Alien and Sedition Acts, you would want to make your argument not just to the judge, but to a jury also. Perhaps you could not convince the judge because the judge had been appointed by the very President whom you were trying to criticize, so you tried to make your argument to the jury by saying: "Jury, this law is unconstitutional. Under the Supremacy Clause<sup>39</sup> it is no law at all. Therefore, by your own oaths of office to the law, you cannot convict me."

In the Fourth Amendment context, when a government official breaks into your house without good reason, you sue that person, and you argue before a jury. It is a civil jury—a Seventh Amendment jury rather than a Sixth Amendment jury—but again, it is a jury that is keeping an eye on governmental unconstitutionality. Why do we have the Eighth Amendment, prohibiting cruel and unusual punishment and excessive bail? It is in part because in sentencing and setting bail, judges often are acting without juries and therefore are less trustworthy because judges are permanent government officials. Likewise, men in the standing army are permanent government officials and less trustworthy, so you want a populist, localist militia to check a nationalist, elitist standing army. The populist and localist jurors can similarly check an elitist, more central, and more nationalized set of federal judges.

Finally, consider the Ninth and Tenth Amendments.<sup>40</sup> The Tenth is clearly about federalism in part, but when the Framers talk about the rights of "the people," in both Amendments, they are paradigmatically not talking about things like individual privacy. That was John Stuart Mill, circa 1859.<sup>41</sup> That was

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38. See Frank H. Easterbrook, *Bills of Rights and Regression to the Mean*, 15 HARV. J.L. & PUB. POL'Y 71, 72-73 (1992).

39. See U.S. CONST. art. VI ("This Constitution . . . shall be the supreme Law of the Land . . .").

40. See U.S. CONST. amend. IX; amend. X.

41. See JOHN STUART MILL, ON LIBERTY 187-88 (David Spitz ed., W.W. Norton & Co. 1975) (1859).

the Fourteenth Amendment, circa 1868. In 1789, the Framers were talking about collective rights paradigmatically, like the right of the people to alter and abolish their government through devices like conventions.

That completes my bird's-eye view of the "Bill of Rights as a Constitution." There is of course much more that could be said about each of the clauses that I have invoked; but I hope that we now have spotted enough issues to spark lively and profitable debate on the subject.

## II. A RESPONSE TO FELLOW PANELISTS

Before I conclude, let me offer a few brief comments on my fellow panelists' thoughtful reactions to my bird's eye view of the Bill of Rights. Professor Berns very usefully points us to the secession experience in which by simple majorities of specially convened conventions, the people of South Carolina, of Virginia, et cetera, claimed this right to alter and abolish their existing government.<sup>42</sup> My own view is that they got popular sovereignty theory right in thinking that it implied a right of conventions acting by simple majority rule to alter even the most fundamental ground rules of society. But—and this is of course a huge "but"—secessionists got the issue of nation versus state wrong. I am with Abraham Lincoln in thinking that in the original Constitution, "We the People of the United States . . . ." meant the people of the United States as a whole.<sup>43</sup> The original Constitution was very different from the Articles of Confederation which were predicated on the sovereignty of the people of each state.

I am in the somewhat awkward position of really saying two things. First, that I believe in *national* popular majoritarianism and popular sovereignty. Second, that the Bill of Rights was promoted by a lot of states' rightist Anti-Federalists; but the Anti-Federalists are using the word "people" that was there in the original Constitution, and in the Preamble. They did not say "peoples" in the Tenth Amendment. They said "people."

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42. See Walter Berns, *On Madison and Majoritarianism: A Response to Professor Amar*, 15 HARV. J.L. & PUB. POL'Y 113, 116 (1992); see also RALPH A. WOOSTER, *THE SECESSION CONVENTIONS OF THE SOUTH* (1962) (giving a thorough history of the conventions specially convened to consider secession).

43. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1451-66 (1987) (explaining the differences in interpretation between states' rightists and nationalists about the sovereignty of "the People"); Amar, *supra* note 14, at 1062 n. 69.

They talked about “the states”—plural—respectively, but they did not say the “peoples” respectively. As a textualist, I think that matters. There are other reasons for thinking Lincoln was right,<sup>44</sup> but whatever you think about secession, the theme of majoritarian popular sovereignty continues to exist at the state constitutional level with state constitutions being amended by simple popular majorities of specially convened conventions throughout the Nineteenth and Twentieth Centuries.<sup>45</sup>

I would also like to respond to Professor Berns’ invocation of Madison.<sup>46</sup> Professor Berns is absolutely right that Madison’s vision was different from the Bill of Rights as it was adopted. Madison wanted the original Bill of Rights to apply against the States precisely because he, as the author of *The Federalist Number 10*, thought that the States were a big part of the problem.<sup>47</sup> He lost on that. Madison was less of a majoritarian than many of the other important folks. James Wilson, for example, was much more of a populist and majoritarian than Madison. Let me also introduce another minor caveat: Instead of looking at Madison at the Philadelphia convention—not a great majoritarian, not a big believer in states’ rights—if we instead look at what Madison became in the Alien and Sedition Act controversy, we see a defender of a certain kind of federalism (championing the ability of state legislatures to challenge the federal government) and of national majoritarianism. A basically national electorate adjudicates the constitutionality of the Alien and Sedition Acts in the election of 1800. Even before that we start to see Madison taking states’ rights a little bit more seriously than he did in Philadelphia by opposing the constitutionality of the First Bank, for example. Madison is an interesting case study, and I am grateful to Professor Berns for reminding us of Madison’s thoughts.

Professor Stith made two points that I would like to address.<sup>48</sup> First, I agree that it is an over-simplification to say that the only rights in the Bill of Rights are majoritarian or collec-

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44. See Amar, *Of Sovereignty and Federalism*, *supra* note 43, at 1451-66 (cataloguing arguments for union based on text, history, and structure); Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 U. CHI. L. REV. 483, 485-91 (1991) (explaining geo-strategic arguments for union).

45. See generally ROGER SHERMAN HOAR, CONSTITUTIONAL CONVENTIONS (1917).

46. See Berns, *supra* note 42, at 114-16.

47. See THE FEDERALIST No. 10, *supra* note 34, at 133-36.

48. See Kate Stith, *The Role of Government Under the Bill of Rights*, 15 HARV. J.L. & PUB. POL’Y 129 (1992).

tive. I do want, however, to remind us of a tradition that a conventional account has basically made all but invisible. The Petition Clause<sup>49</sup> is a good example. Individuals can petition, and of course, sometimes petitions will present conflicting individual interests. But often we miss the important role of petitions when a majority of citizens complain about unrepresentative or self-interested government. For example, in 1816, Congress for the first time since 1789 voted itself a pay increase, and there were a lot of populist petitions against that.<sup>50</sup>

I would also like to comment on the word "people" in the Fourth Amendment. Professor Stith is absolutely right that Tony Amsterdam takes this phrase and tries to make arguments about the exclusionary rule and collective rights.<sup>51</sup> I want to disassociate myself from that in two ways. One, I do not think in the Fourth Amendment that "the people" is as strong a phrase as elsewhere, precisely because in this Amendment, but not elsewhere, the phrase is twice modified by the word "persons," which is much more individualistic. Two, I am not a supporter of the exclusionary rule. The reason is illustrative of my main theme. Judges have taken the Fourth Amendment and made it the province of judges to enforce in an exclusionary rule context focusing on criminals. The *old* way the Fourth Amendment was litigated, however, was very different: The government official broke into your house; you sued the official in trespass for damages; and a jury rather than a judge decided.<sup>52</sup> Do you know why we do not do that today? Judges have created a thing called good faith immunity. It has been created not just as an exception to the exclusionary rule, but also as an exception to damage actions: When government officials are acting unconstitutionally, they are now personally immune from damages in a way that they never were at common law, and never were even at the beginning of this century.<sup>53</sup> This is an interesting story about the shift away from

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49. See U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.").

50. See 4 JOHN BACH MCMASTER, A HISTORY OF THE PEOPLE OF THE UNITED STATES 357-62 (1927).

51. Stith, *supra* note 48, at 132.

52. Justice Scalia has recently re-focused attention on this older model. See *California v. Acevedo*, 111 S. Ct. 1982, 1992-94 (1991) (Scalia, J., concurring in judgment).

53. See Amar, *Of Sovereignty and Federalism*, *supra* note 43, at 1437.

juries as protectors of the values of the Bill of Rights, and towards judges.

One final word on Professor Langbein's presentation.<sup>54</sup> Note how we have shifted ever so subtly away from a perspective on jury trial as about popular participation and democratic self-governance ("We have juries because these are people's representatives in the judiciary, just like the people's representatives in the legislature, and the jury serves their interests and their rights") to a more defendant-oriented perspective ("It is unfair for the defendant to get hammered in these plea-bargains"). I think this attitude is reflected, interestingly, in one key move that Professor Langbein makes. He says, "You know, the text of Article III says"—and I agree with him—"...the trial of all crimes shall be by jury. . ." But then he actually introduces a little word; he says, "Oh, that means *serious* crimes." I am not so sure that it means *serious* crimes. It may have meant serious crimes in England or in states that had differently worded constitutions, but there is a nice piece in the *Chicago Law Review* that critiques the idea that there is even a petty crime exception to federal jury trial.<sup>55</sup> Why did Professor Langbein suggest that there was such an implied exception after emphasizing the plain meaning of the text? Well, if one adopts more of an individual rights or defendant-oriented perspective on jury trials, one is likely to focus on whether the offense charged is a serious offense. If so, the defendant has more to lose, and so there is more of an interest in jury trial than where there is a petty offense. But if you focus instead on the jury as a vehicle for democratic participation, then the jury has equal value even in petty offenses. I do not want to push the point too hard. I suspect Professor Langbein might say: "Yes, but at some point the defendant's interest is key here because there is no similar mandate on the civil side. So where you do not have an individual defendant subject to the extraordinary coercive power of government—where you have individual versus individual, as in Professor Stith's petition case—jury trial may be waived by the parties in a way that was not true in the criminal context." That reminds us of Professor Stith's big point: There are indi-

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54. John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial*, 15 HARV. J.L. & PUB. POL'Y 119 (1992).

55. See George Kaye, *Petty Offenders Have No Peers*, 26 U. CHI. L. REV. 245 (1959) (criticizing Felix Frankfurter and Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial By Jury*, 39 HARV. L. REV. 917 (1926)).

vidual rights aspects to these issues as well. I merely want to caution us against thinking that this is *all* that is at issue. There are other concerns, and we have forgotten many of them.